Wagon Wheel Bowl, Inc. and Culinary Alliance & Bartenders Union, Local 498, affiliated with Hotel Employees & Restaurant Employees International Union, AFL-CIO. Case 31-CA-18747

November 14, 1996

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS BROWNING, FOX, AND HIGGINS

On March 31, 1993, the National Labor Relations Board issued a Decision and Order¹ finding, among other things, that the Respondent, Wagon Wheel Bowl, Inc., violated Section 8(a)(1) and (5) of the Act. The Board ordered the Respondent to make its employees whole by paying all contributions to the Restaurant Employer-Employee Union Welfare Fund (the Fund), as required by the expired collective-bargaining agreement between the Respondent and the Union. On January 30, 1995, the United States Court of Appeals for the Ninth Circuit, in an unpublished opinion, enforced the Board's Order. A controversy having arisen over the amount of contributions due under the Board's Decision and Order, on May 17, 1995, the Regional Director for Region 31 issued a compliance specification and notice of hearing. Thereafter, on August 9, 1995, the Acting Regional Director for Region 31 issued an amended compliance specification and notice of hearing that showed the computations for the contributions that the Respondent was ordered to pay to the Fund.

On August 25, 1995, the Respondent filed an answer to the amended compliance specification. On September 6, 1995, the General Counsel sent a letter to the Respondent advising it that its answer was defective in that it did not fully comply with Section 102.56(b) of the Board's Rules and Regulations. On September 15, 1995, the Respondent filed an amended answer to the amended compliance specification. On November 20, 1995, the General Counsel filed with the Board a motion to strike certain portions of the Respondent's amended answer and a Motion for Summary Judgment. The General Counsel argues in his motions that the Respondent's answers to the allegations in paragraphs 2 through 10 of the amended compliance specification, the introductory paragraph, as well as the Respondent's affirmative defense, do not comply fully with the requirements of Section 102.56(b) and (c).

On November 24, 1995, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. On December 6, 1995, the Respondent filed a response to the Notice to Show Cause, to which it appended a second amended answer.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

Ruling on Motion to Strike and for Summary Judgment

Section 102.56(b) and (c) of the Board's Rules and Regulations specify that:

- (b) Contents of answer to specification.—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the Respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.
- (c) Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification. . . . If the Respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

In its first amended answer to the amended compliance specification, the Respondent asserted that it lacked sufficient knowledge to admit or deny many of the allegations of the amended compliance specification. Based on this first amended answer, the General Counsel filed his Motion for Summary Judgment. We find that the Respondent's first amended answer is deficient insofar as it contains general denials concerning those matters within the Respondent's knowledge. The denials are insufficient because they do not fairly meet the substance of the allegations of the specification, nor do they reveal the bases on which the Respondent

¹ 310 NLRB 915.

disagrees with the specifications, as required by our rules.

The Respondent filed a response to the Notice to Show Cause, to which it has attached a second amended answer. In this response, it opposes the General Counsel's Motion for Summary Judgment, and it admits the allegations that it had previously denied based on a lack of knowledge. The Board has held that a respondent may amend its answer, even in the absence of a further amendment to a compliance specification filed after the respondent filed its original answer.² We therefore accept the Respondent's second amended answer to the amended compliance specification.

Paragraph 2 of the amended compliance specification alleges that the monthly fund payment is \$35 per employee, the amount provided for in the expired collective-bargaining agreement between the Union and the Respondent. Paragraph 3 of the amended compliance specification lists the names of employees for whom fund contributions have been unlawfully withheld by the Respondent. Paragraph 9 of the amended compliance specification, combined with appendix B, sets forth the formula and additional amounts due the Fund under *Merryweather Optical Co.*, 240 NLRB 1213 (1979). Paragraph 10 of the amended compliance specification summarizes the facts and calculations set forth in the prior paragraphs. It states:

the obligation of the Respondent under the terms of the Board Order of March 31, 1993, to make whole its employees by payment into the Fund . . . of the amount of \$8,715.00, plus the additional amounts due the Fund of \$1,456.01, reserving for future determination any amounts owing by the Respondent for periods subsequent to April 30, 1995.

In its affirmative defense, the Respondent states that "Respondent cannot be required to make fringe benefit contributions based upon any collectively-bargained-for agreement to which it did not voluntarily agree." The Respondent's second amended answer to paragraphs 2, 3, 9, and 10 admit some of the allegations of these paragraphs. The Respondent, however, asserts that the collective-bargaining agreement which it had executed had a term ending on May 1, 1990, and that it offered during subsequent bargaining to extend the contract for only 1 year. The Respondent states or implies in each of these answers that for all but 4 months of the period for which fund contributions are sought, January 1, 1991, to April 30, 1995, the Respondent has no liability to the Fund because it was not bound by the collective-bargaining agreement.

Section 8(a)(5) of the Act obligates an employer, on expiration of a collective-bargaining agreement, to maintain existing wages, hours, and terms and condi-

tions of employment. NLRB v. Katz, 369 U.S. 736, 747 (1962). Health insurance plans are included in the definition of employment conditions. Clear Pine Mouldings, 238 NLRB 69, 79 (1978). The Board has found in the underlying proceeding that the Respondent was bound by the terms of the collective-bargaining agreement that expired May 1, 1990, and that no subsequent collective-bargaining agreement was reached before the Respondent unlawfully withdrew recognition and implemented unilateral changes.3 Thus, the Respondent was not entitled to discontinue payments to the Fund unilaterally after the contract expired. The Respondent cannot relitigate these findings in this proceeding. Transport Service Co., 314 NLRB 458, 459 (1994). Accordingly, we grant the General Counsel's motion to strike the Respondent's second amended answer to paragraphs 2, 3, 9, and the final paragraph of the Respondent's second amended answer to paragraph 10 of the amended compliance specification and to strike the Respondent's affirmative defense.

The Respondent also denies the implied assertions in the introductory paragraph of the amended compliance specification that bargaining unit employees have been adversely affected by the Respondent's unilateral substitution of its health plan for the plan provided in the collective-bargaining agreement, the Restaurant Employer-Employee Union Welfare Fund. In the underlying proceeding, the Board found that the Respondent "unilaterally implemented a new health insurance plan for unit employees . . . without affording the Union notice and an opportunity to bargain."4 The Board's Order requires the Respondent to make its employees whole by making all delinquent contributions to the Fund and by reimbursing employees for any losses they have incurred as a result of the Respondent's unilateral discontinuance of the payments, with interest.⁵ As the Board has made findings of fact and conclusions of law with respect to the Respondent's failure to pay contractually required contributions to the Fund and to make bargaining unit employees whole, the Respondent cannot relitigate those findings and conclusions in this proceeding. Transport Service, supra. Accordingly, we grant the General Counsel's motion to strike the Respondent's answer to the introductory paragraph of the amended compliance specification.⁶

² See Vibra-Screw, Inc., 308 NLRB 151, 152 (1992).

^{3 310} NLRB 915.

⁴³¹⁰ NLRB at 917.

⁵ Id. at 918.

⁶To the extent that the Respondent contends that it should not be required to make the Fund whole because unit employees were provided with an alternative plan, we reject that contention. "[E]mployees have, in addition to a stake in receiving benefits negotiated on their behalf by their chosen representatives, a clear economic stake in the viability of funds to which part of their compensation is remitted." *Manhattan Eye, Ear & Throat Hospital*, 300 NLRB 201, 201–202 (1990), enf. denied 942 F.2d 151 (2d Cir. 1991). Although the court denied enforcement, it did so on the basis of evidence that the union had disclaimed interest in representing

Part of the Respondent's second amended answer to paragraph 10, described above, denies the allegation "on the grounds that to impose liability upon Respondent will result in a double recovery rather than make the unit employees whole for any losses incurred as a result of unfair labor practices by the Respondent and based on this premise, asserts that no sums are due." To the extent that the Respondent's second amended answer disputes findings of liability contained in the underlying unfair labor practice proceeding, the Respondent cannot relitigate those findings in this proceeding. Transport Service, supra. This part of the Respondent's second amended answer to paragraph 10 of the amended compliance specification also does not comply with Section 102.56(b) and (c) of the Board's Rules and Regulations because it does not 'specifically admit, deny, or explain" the allegation.

The Respondent alternatively argues, in its second amended answer to paragraph 10, that "it is informed and believes that the monthly trust fund contribution increased from \$35.00 per month to \$40.00 per month in [sic] January 1, 1991," and that it "is informed and believes that the monthly trust fund contribution increased from \$40.00 per month to \$55.00 per month in October 1993." The Respondent asserts that it has requested the trust funds to provide the Respondent with information about whether or not the trust funds will accept monthly contributions at the \$35-per-month rate set forth in the amended compliance specification.

In its response to the Notice to Show Cause, the Respondent cites Antrim Transportation System, 193 NLRB 179 (1971), to support its contentions that the trust funds would no longer accept the contributions that the amended compliance specification orders the Respondent to pay, and that this issue is best resolved by a hearing. We disagree. In Antrim, the Board adopted a trial examiner's rejection of a similar claim. In that case, the claim was that pension fund contributions that had been ordered by the Board in an unfair labor practice proceeding would not be accepted by the fund. The Board adopted the trial examiner's denial of the motion to reopen the record to hear the claim, and his recommendation that the respondent tender to the pension fund the amount of the delinquent contributions specified in the compliance specification. Likewise, we find no issue of fact or law raised in the Respondent's answer here warranting a hearing on this issue, and, to the extent that it constitutes a denial, the answer does not "fairly meet the substance of the allegations of the specification at issue," within the meaning of Section 102.56(b) of the Board's Rules and Regulations.

Finally, in its second amended answer to amended compliance specification paragraph 10, the Respondent alternatively asserts that it has "no obligation to pay contributions to individuals who were not part of the bargaining unit in question at the time that Respondent ceased making contributions to the trust funds," specifically for Lora Newman and Jeanene Poutre. To the extent that that assertion is a denial, it does not, without more, "fairly meet the substance of the allegations to the specification at issue," within the meaning of Section 102.56(b) of the Board's Rules and Regulations. Accordingly, we strike the Respondent's second amended answer to paragraph 10 of the amended compliance specification.

As we have struck the Respondent's answer to the amended compliance specification's introductory paragraph and paragraphs 2, 3, 9, and 10, and its affirmative defense, the Respondent is precluded from introducing any evidence controverting these allegations. The Respondent's second amended answer admits paragraphs 1, 4, 5, 6, 7, and 8 and the allegations of paragraph 3, save that described above, of the amended compliance specification. Therefore, we find that all the remaining allegations of the amended compliance specification and notice of hearing are deemed admitted as true.

Accordingly, the Board grants the General Counsel's Motion for Summary Judgment and concludes that the amount due the Fund is as stated in the amended compliance specification and we will order payment by the Respondent of that amount to the Fund, plus any additional amounts that accrue on those amounts to the date of payment.

ORDER

The National Labor Relations Board orders that the Respondent, Wagon Wheel Bowl, Inc., Oxnard, California, its officers, agents, successors, and assigns, shall pay the Restaurant Employer-Employee Union Welfare Fund \$10,171.01, plus any additional amounts that accrue on that amount to the date of payment as computed in accordance with *Merryweather Optical Co.*, supra.

employees. The court concluded from that that the unit employees no longer had a future interest in the stability of the fund. That is not the case here. See also *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983).

⁷The Respondent does not assert that Newman and Poutre were not in the bargaining unit at the times that the Respondent was delinquent for contributions on their behalf, as stated in the amended compliance specification. Instead, it asserts only that they were not in the unit at the time it "ceased" making contributions. It appears that the Respondent is referring to its initial delinquency when it stopped making contributions on behalf of employees in the unit. According to the amended compliance specification, no contributions are owed on behalf of Newman and Poutre as of that time. However, the amended compliance specification also shows that Newman and Poutre were members of the bargaining unit—and the Respondent does not contend otherwise—during later years during which the Respondent continued to withhold contributions from the Fund. Thus, the Respondent's assertion does not fairly meet the substance of the allegation.